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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CASEY McCREADY,

Defendant and Appellant.

F056526

(Super. Ct. No. 7058)

OPINION

APPEAL from a judgment of the Superior Court of Mariposa County. F. Dana Walton, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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Casey McCready was convicted of willfully inflicting corporal injury on his wife, Brandy McCready, and of assaulting Brandy's friend, Michael Tilton, with a deadly weapon, a rock. Casey now argues that Brandy tainted the venire panel by discussing the case in the courthouse in the presence of prospective jurors on the day of jury selection.

He claims the trial court should have dismissed the entire panel and declared a mistrial. Casey also argues that Brandy's preliminary hearing testimony was erroneously admitted at trial after she refused to testify there. Finally, he contends there was insufficient evidence to support the jury's finding that the rock was a deadly weapon, and he argues that the court should, on its own motion, have given a jury instruction on simple assault. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

On June 9, 2008, Michael Tilton and his 18-year-old son Matthew flagged down Mariposa County Deputy Sheriff Jake Bobman as Bobman drove up to the sheriff's office in Mariposa. The Tiltons told Bobman they had been riding in Brandy McCready's car when her husband Casey appeared on the highway on his motorcycle and forced her to pull off the road. As Brandy got out of the car, Casey dismounted the motorcycle and picked up two rocks four or five inches in diameter. Yelling, he walked in front of the car and threw the rocks. One rock hit the windshield about a foot away from where Michael was sitting in the front passenger seat. The windshield broke and some particles of glass fell on Michael, but he was not injured. The other rock bounced off the hood. The Tiltons showed Bobman the car, which Brandy had driven to the sheriff's office after the altercation. She had left it there after Casey—who followed Brandy's car to the sheriff's office—demanded that Brandy leave with him on the motorcycle or he would "mess with" Michael and Matthew.

Michael indicated the direction in which the McCreadys left on the motorcycle, and Bobman and two other deputies went to search for them. Bobman found them on Slaughterhouse Road, a dirt road in an isolated area with no houses nearby. He heard Casey yelling and saw the motorcycle lying on its side in the road. Then he saw Casey running away. Bobman called out to Casey to return, which he did. Brandy tried to step between Bobman and Casey and asked Bobman to let Casey go. She was crying.

Bobman arrested Casey for the rock-throwing incident. He did not notice any injuries on Brandy.

Later the same day, Michael Tilton saw Brandy again. She had two black eyes and a large bruise on her leg. The following day, June 10, 2008, Brandy appeared at the sheriff's office and asked Sergeant Kathleen Rumfelt to take photographs of injuries Casey inflicted on her the day before. Rumfelt saw and photographed Brandy's two black eyes, a large bruise on her left thigh, a bruise on her chest, and marks and scrapes on her face, chin, and back. Rumfelt compared the thigh bruise to the shape and tread pattern of the boots Casey was wearing at the time of his arrest; she believed they matched.

The district attorney filed a complaint on June 11, 2008, and a preliminary hearing was held on July 14, 2008. Brandy testified at the preliminary hearing. She said she was driving with the Tiltons in her car when she saw Casey heading the other way on his motorcycle. After they passed each other, Casey turned around, rode up to the car, passed it, and then slowed down in front of it. He sped up and slowed down again one or two more times, until Brandy pulled over. Casey also pulled over. When Brandy got out to talk to him, Casey picked up the rocks and started yelling "[a]bout having people in [her] car." She tried to block the rocks with her arms and she pushed Casey. Then she ran and pushed over the motorcycle and ran back to her car and drove off. Casey caught up on his motorcycle, and as Brandy drove to the sheriff's office, he got in front of the car and repeatedly slowed down and sped up. At the sheriff's office, Brandy got out and Casey yelled some more. He yelled to the Tiltons to "stay away from his wife." Brandy decided to let Casey take her away on the motorcycle because he had been absent for the previous four days; she wanted "[t]o go talk to him so that we might come to some agreement because I told him that I was not going to continue with the relationship because I didn't want to be—I didn't want him to continue to be gone for four days and not contact me." While riding, Brandy took off her helmet and hit Casey with it because she wanted to get off. He stopped, she got off, and he ordered her to get back on. He said, "'I'm going up

to Slaughterhouse and we can talk.'" She agreed. "I knew he wasn't going to just let me go, so I got back on the bike and I went back to Slaughterhouse," she said.

When they got to Slaughterhouse Road, she said, "I got off and I laid down on my back." She said she was "expecting to get knocked down" and "was going to end up on the ground [anyway]." She put her hands over her face. Casey sat on her stomach and started hitting her face, telling her to move her hands away from it. Then he tried to hit her in the groin, but hit the inside of her thigh instead. Next, he bit her lips because, as she said, "I wouldn't shut up, I wouldn't stop talking because I kept telling him that I know how hard it is to be a family because I know that his drug habit has been a priority in his life for so long that it's hard for him to stop hanging out with his druggie friends and his druggie lifestyle is so important to him that he can't stop." The bite broke the skin. Casey asked Brandy if she was having sex with Michael and Matthew Tilton. As Casey got up and walked to the motorcycle, Brandy continued talking about his drug use, saying "his druggie friends are more important than our son and our life with his son." Casey "stated something about, you know, you want to die, don't you, or something like that," and kicked her in the thigh. Then she "just cried and whimpered because that hurt really bad." Finally he told her she could get up. She tried to stand, but was dizzy and fell. She tried again twice and was able to stand on the third attempt. Then she went to help Casey pick up his motorcycle, "[b]ecause, believe it or not, I love him."

By the time Deputy Bobman arrived, Brandy was walking away from Casey. She asked Bobman to let Casey go "because, I don't know, I feel sorry for him sometimes." She threw up while in the bathtub later that day, and was told by a doctor that this was caused by a concussion. Brandy identified photographs of her blackened eyes, the bruise on her thigh, bruises on her chin "where he grabbed me by the face to make me look at him," and a bruise on her chest.

The district attorney filed an information containing three counts: (1) assault with a deadly weapon, a rock, upon Michael Tilton (Pen. Code, § 245, subd. (a)(1)[1]); (2) willful infliction of corporal injury on a spouse (§ 273.5, subd. (a)); and (3) misdemeanor vandalism of Brandy's car (§ 594, subd. (a)). The information also alleged, for sentence-enhancement purposes under section 667.5, that Casey had served prison terms for five prior convictions. The vandalism charge was dismissed at the prosecutor's request after Casey agreed to pay for the damage to the car. The enhancement allegations were also dismissed at the prosecutor's request because Casey completed his most-recent prison term more than five years before the current offenses.

On the morning of jury selection, Brandy was at the courthouse, speaking to prospective jurors. The prosecutor brought this to the court's attention:

> "MS. FLETCHER: … I think we need to make—put on record what's happened this morning. We got a call from the clerk, Morgann, who's sitting here, that there was some fear that jurors may have overheard Brandy McCready talking—
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> "THE COURT: The victim.
>
> "MS. FLETCHER: —out on the steps, and then again in the hallway to Mr. Green [i.e., defense counsel], saying things along the lines of 'This is bullshit, I don't want to testify.' And I don't know what else—that's what—that's what one of the bailiffs told me was said. I was here from 8:15 to 8:30. At that time, there were at least 50 jurors milling through the hallway.
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> "I left at 8:30, and I understand that happened within minutes of me leaving. So I don't know whether jurors overheard it or not, but I know that one of the things that was—Mr. Green represented was that the bailiff represented he could—she could be heard upstairs … as well as in the hallway. So I think we might have a mistrial issue right off the bat. But we need to make sure to ask those jurors if they overheard that."

Defense counsel described what he witnessed:

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[1]Subsequent statutory references are to the Penal Code unless otherwise indicated.

"MR. GREEN: She was speaking fairly loudly. I was speaking softly, as I normally do.

"THE COURT: Right.

"MR. GREEN: She was making representations about promises that the District Attorney's office had made to her about a disposition of the case.

"THE COURT: Right.

"MR. GREEN: What they assured her would happen, and they were reneging on and she was upset about it, and she did not want him to go to prison. She made some reference to things that I should ask her while she's on the witness stand, and I told her that I couldn't ask her those things."

The court reporter, court clerk, and security officer also told the court what they saw and heard. The court reporter, who was upstairs, could hear Brandy speaking downstairs about lesser charges. The clerk told defense counsel that prospective jurors could hear. The clerk also saw Brandy hugging a prospective juror. The security officer, working downstairs, saw Brandy speaking with defense counsel, but could not hear her. Prospective jurors were nearby. The security officer told Brandy she could not mingle with prospective jurors. He made her move, but she came back and talked with some of the prospective jurors.

At this point, the prosecutor informed the court of some facts that might have helped explain Brandy's opposition to the prosecution of Casey:

"On Thursday, we made an offer to the defendant that was rejected. He went back to the jail.

"Apparently someone at the jail overheard, this is the allegation that was told to me, him saying I don't care about the offer, this thing's never going to start trial on Tuesday, she's going to be found in a ditch.

"Now, I don't know if he said that, but that was relayed to me by an inmate's lawyer. So I don't know if that was the truth or not. But that was relayed to me thirdhand. I felt that I had a Tarasoff duty to advise the victim. I think there was further allegation about ties to the area. Ties to the Aryan Brotherhood.

> "I contacted the victim and said there's been a rumor that Mr. McCready is upset and made some comment that you would be found in a ditch this weekend. And we offered her some type of protective custody, which she declined because she had what she felt were safe plans. And then on Friday, she contacted our office and felt she no longer needed those safe plans and was with the defendant's father, parents, had left her family, and was with the defendant's father and made some comment to Victim/Witness that I must have made that up and didn't want to testify. [¶] … [¶] [T]hen I understand on Sunday, she called the sheriff's office and again asked for protective custody."

The court asked defense counsel if he wished to respond. Counsel said, "I would just add that I got a phone call last night from a family member, advising me that Ms. McCready wanted to meet with me, and I thought with Ms. Fletcher, at 8:15 this morning. And that's why I showed up and was visiting with her at all."

Next, the court interviewed juror No. 66062, who had been identified as the person Brandy had hugged. Juror No. 66062 had known Brandy since 2001; she formerly stabled Brandy's horse and once lived with Brandy's mother. She confirmed that Brandy hugged her and talked to her in the courthouse that morning: "Yeah, she gave me a hug, and said, 'You're going to be a juror on my trial,' and I go, 'Not anymore.' And she goes, 'Yeah, just don't say anything.' And I go, 'No, I can't not say anything.' She goes, 'Be on it, be on it.' That was it." Juror No. 66062 was excused for cause.

The court brought in the rest of the venire panel. It told the prospective jurors that it had received information that some of them might have interacted that morning with a potential witness or heard something about the case, and asked them to raise their hands if they had. Three raised their hands and the court questioned them individually outside the presence of the others. Juror No. 64910 was entering the courthouse and heard someone say, "'No, no, don't do anything to that person, they're a witness.'" She looked and saw a woman. Defense counsel asked, "Is there anything that you heard that you believe would prevent you from being fair and impartial as a juror?" The juror said no. The parties agreed that they had no objection to juror No. 64910.

Juror No. 67230 said, "The lady who was sitting next to me and then the juror who is in front of me, I guess one of the participants came up and spoke to her prior to the trial—or prior to us coming into the courtroom. And she was talking about that and that the lady asked her not to, you know, be on her jury, and proceeded to tell us their whole life story about the husband beating the wife and all this." The court said, "Who? The other juror told you that?" Juror No. 67230 said yes. The other two prospective jurors involved in this conversation had both raised their hands when the court inquired. In addition to these, according to juror No. 67230, there could have been "a couple others" who overheard, "[i]f they were near her." Juror No. 67230 was excused for cause.

Juror No. 68628 told the court, "She just told us all about both people, what she thought this trial was going to be about. They've been having family problems, and the husband took the child, and she went—and went someplace. And the woman tried to see it and she couldn't see it, and just all kinds of stuff." Juror No. 68628 was one of those involved in the conversation described by juror No. 67230. She thought Brandy "didn't really project her voice out to anyone else." Juror No. 68628 was excused for cause.

Juror No. 66062 was called back in and confirmed that she was the third prospective juror involved in the conversation between juror No. 68628 and juror No. 67230. She was not sure, but thought no one else heard the conversation. She said there was a man sitting about 10 feet away in the same row of seats who might have heard.

The clerk remembered the man. He was juror No. 69296 and the court questioned him. He said, "I could hear them whispering, yeah, but I didn't pay attention." The parties did not object to him.

After the court finished interviewing the prospective jurors and excused jurors 66062, 67230 and 68628, defense counsel moved for mistrial on the ground that the entire venire panel was tainted. The court denied the motion.

Brandy had asked the clerk if she could meet with the judge and counsel, so the court brought Brandy into the courtroom. Threatening her with contempt sanctions, it ordered her not to have further contact with prospective jurors and, if testifying, not to say anything unresponsive to the questions asked. Then it asked her what she wanted to say. She replied:

> "I stated to Kim [i.e., the prosecutor] when all this began that I would not take pictures and I would not give a statement unless she tried and attempted to give Casey rehabilitation and anger management. I stated to her clearly that I would not go through with this. And I would not give him pictures and I would not make a statement and would not testify against him unless she attempted, at least attempted to give him rehabilitation. And that would mean, and I give her permission to lower the charges to get him rehabilitation, because I feel that he has not been given the chance to get rehabilitated. Because I do believe that his meth addiction is what is causing this, and you and I both know how deadly that disease is."

The prosecutor said, "I don't make plea bargains with victims."

The court told Brandy it would appoint an attorney to represent her if she chose not to testify. She said, "Fine, then I choose not to testify."

The trial began the next day, September 3, 2008, and the prosecution called Brandy as a witness. Outside the presence of the jury, Brandy's attorney confirmed that Brandy was refusing to testify and conceded that she was not doing so pursuant to a privilege. The prosecutor said, "This is one of the situations where the Court can't hold a witness in contempt." Presumably, she was referring to Code of Civil Procedure section 1219, subdivision (b), which prohibits incarceration as a contempt sanction for a victim of a domestic violence crime or a sexual assault who refuses to testify. The court did not not disagree. It said, "But I can impose other things by law." It told Brandy:

> "[I]f … you refuse to testify, and you have already indicated that, [then] the Court has the authority at this stage, and this would be as to the first potential contempt, to order that you undergo 72 hours of domestic violence counseling through the Mariposa County Behavioral Health. And that will be completed on or before October 15th.… And if you fail to do so, that

would be a violation of the Court's order, which you could then be held in contempt for.

"If you should be called as a witness in this matter if it should go to re-trial and you refuse to testify, at that time, the Court could impose contempt, which would include jail."

Partly because the prosecutor wanted the jury to see Brandy's "size vis-a-vis the defendant," the court brought the jury in and had the prosecutor ask Brandy if she was refusing to testify. Despite having been warned not to make nonresponsive statements, Brandy took the opportunity to deny Casey's culpability:

"Q. [Ms.] McCready, do you refuse to testify today?

"A. Yes. It was mutual combat and I refuse to."

The court declared Brandy unavailable as a witness and granted the prosecution's request to introduce her preliminary hearing testimony. That testimony was read to the jury.

The prosecution's other witnesses were Michael Tilton, Deputy Bobman, and Sergeant Rumfelt, who testified to the facts we have described above.

Casey testified in his own defense. He said that on June 9, 2008, he had an argument with Brandy on the phone. Then he got on his motorcycle and rode toward Brandy's grandparents' house, where she had been when they spoke. He saw her on the highway, turned around and signaled to her, and then pulled off the road. She also pulled over and got out. He asked her "what were those guys doing in her car," and picked up two rocks. She asked what he was going to do with them. "'I'm going to break your headlights,'" he said. He tried to throw one at a headlight, but she pushed him, so he missed and hit the windshield. His second throw also missed the headlight. He had no intention of hurting the Tiltons and "couldn't believe" he was charged with assault with a deadly weapon.

Then Brandy and Casey "just got in a pushing match." Brandy picked up a rock and pushed him with it. Next, she knocked the motorcycle over and ran back to her car

and drove to the sheriff's office. Casey picked up the motorcycle and followed. At the sheriff's office, he told Michael Tilton, "'Go ahead and just take the car and stay away from my wife.'" He did not threaten the Tiltons and "was just glad they didn't get out and gang up on me." He rode away with Brandy. When she hit him with her helmet, they "almost wrecked." They continued on to Slaughterhouse Road and got off the motorcycle and argued. Then Brandy suddenly fainted. "[S]he lays down on ground and starts rolling around in the dirt." Casey knew the deputies would come looking for them and he asked Brandy if she was trying to get him in trouble. He tried to lift her up and she bit his arm. She had bitten him eight or 10 times in the past. He pushed her away. She got up and he saw that she was holding a knife he had been carrying. He wore it in a sheath on his belt and assumed she took it while sitting behind him on the motorcycle. He demanded that she return it and she did. Casey turned and started walking up the road when Deputy Bobman arrived.

Casey denied that he sat on Brandy or punched her or kicked her. She sustained one of the bruises shown in the photos when he was trying to stop her from biting him, but he had no idea how she got the black eyes or the boot-sole-shaped bruise on her thigh. The only reason he ran away when Deputy Bobman arrived was that he did not have a license to drive a motorcycle and feared the motorcycle would be impounded.

The prosecution called Matthew Tilton as a rebuttal witness. He had his eyes closed for much of the encounter; he closes his eyes as a way of avoiding stress. At the sheriff's office, he heard Casey tell Brandy, "'[G]et on the goddamn motorcycle or I'm going to kill you.'" He did not hear Casey tell Michael Tilton to take the car and stay away from Brandy.

The jury found Casey guilty of both charges. At sentencing, Casey requested that he be given probation and ordered to participate in the Delancey Street Foundation rehabilitation program. The court rejected this request and sentenced Casey to a five-year prison term, consisting of the four-year upper term for inflicting corporal injury on

Brandy and a consecutive term of one year, equal to one-third of the middle term, for assaulting Michael with a deadly weapon.

DISCUSSION

I. Request to dismiss venire panel

Casey argues that the trial court should have granted his request to dismiss the entire venire panel and declare a mistrial. He does not attempt to show that any individual juror who served on his jury was tainted. He relies, instead, on the possibility that unknown members of the venire panel heard and were biased by Brandy's statements at the courthouse before jury selection, but failed to disclose this to the court when asked.

A party may request discharge of an entire panel of prospective jurors "for cause." (Code Civ. Proc., § 225, subd. (a).) The trial court should grant the request when possible bias has caused "extreme" contamination of the entire panel. (*People v. Medina* (1990) 51 Cal.3d 870, 889.) This is a "drastic remedy" and "should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation or removal of the offending venirepersons would be insufficient protection for the defendant." (*Ibid.*) In reviewing the trial court's decision not to dismiss the venire panel, we consider the totality of the circumstances and apply the abuse of discretion standard. (*Ibid.*; *People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466-1467.) The court abuses its discretion if its decision exceeds the bounds of reason. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378.)

We conclude that the court did not abuse its discretion. Upon being told of the problem, the court took reasonable steps to identify prospective jurors who heard or made potentially prejudicial statements. It interviewed five prospective jurors and excused three for cause on these grounds. The other two heard nothing significant, and the parties had no objections to them.

Casey argues that, because Brandy was speaking loudly enough to be heard upstairs while all the prospective jurors were downstairs with her, most "of the jury pool

must have heard Brandy … ranting," so some prospective jurors must have heard prejudicial comments and failed to acknowledge this when the court inquired. This is speculative. There is no record of what Brandy said when she was speaking loudly enough to be heard upstairs and no evidence that any unexcused juror understood and was prejudiced by it.

Casey also argues that, because the security officer saw Brandy talking to prospective jurors and it was not shown that these were the same as the jurors who responded to the court's inquiry, there must have been "several potential jurors who had talked to Brandy that morning but did not acknowledge it in court." This, again, is speculative. The court's statement to the panel was, "Now, if there's anybody who did, in fact, have any interaction with a potential witness in this case or interact[ed] or heard or saw something that they feel should be brought to the attention of the Court, I'd like you to do that now." Prospective jurors who were present while Brandy was talking—even assuming these were not the same prospective jurors who raised their hands—might reasonably not have viewed their presence as "interaction" and might not have heard anything of significance.

Finally, Casey relies on the statement by juror No. 66062 that there was a woman nearby when Brandy spoke to her. Casey says this woman was never identified and questioned. That this person heard what Brandy said, was prejudiced by it, and failed to tell the court about it is entirely speculative. Juror No. 66062 herself said, "I don't think anybody heard."

In sum, there is no evidence that any prospective jurors other than those who responded to the court's inquiry received prejudicial information. The court's response to the situation was within the bounds of reason.

Casey relies on *People v. Marshall* (1990) 50 Cal.3d 907, 950-951, for the proposition that "[a] judgment adverse to a defendant in a criminal case must be reversed or vacated 'whenever … the court finds a substantial likelihood that the vote of one or

more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.'" The *Marshall* court made this statement in the context of a discussion about the standard for rebutting the presumption of prejudice when an actual juror has engaged in misconduct that exposed other actual jurors to improper material. The case, therefore, is not on point. In any event, we do not believe there is a substantial likelihood that the vote of any juror was influenced by prejudicial matter.

II. Admission of preliminary hearing testimony

Casey contends that the trial court erred in ruling that Brandy's preliminary hearing testimony was admissible in spite of the hearsay rule because she was unavailable. As we will explain, any error was harmless.

Evidence Code section 1291, subdivision (a), provides that "former testimony," which includes testimony at a preliminary hearing, "is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness" and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

Evidence Code section 240 defines the term "unavailable as a witness" as meaning the declarant is any of the following:

> "(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> "(2) Disqualified from testifying to the matter.
>
> "(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
>
> "(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
>
> "(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure

> his or her attendance by the court's process." (Evid. Code, § 240, subd. (a).)

A witness can also be deemed unavailable if expert testimony establishes that trauma from a crime has rendered a witness unable to testify without suffering substantial trauma. (Evid. Code, § 240, subd. (c).)

Refusal to testify by a witness who is present is not one of the enumerated grounds for finding a witness unavailable. The Supreme Court has held, however, that the list of circumstances set forth in Evidence Code section 240 is not exclusive. (*People v. Reed* (1996) 13 Cal.4th 217, 228.) This court held in *People v. Sul* (1981) 122 Cal.App.3d 355, 364-365 (*Sul*), that a witness who refuses to testify without asserting a privilege may properly be found unavailable if the court takes reasonable steps to induce the witness to testify or if it is clear that such steps would not succeed. The Supreme Court quoted *Sul* with approval in a case in which it upheld the trial court's finding of unavailability of a witness who refused to testify in a capital case so long as she was forbidden to state her opposition to the death penalty, and who stated under oath that nothing the court could do would change her mind. (*People v. Smith* (2003) 30 Cal.4th 581, 621, 623-624 (*Smith*).)

In *Sul*, the trial court first jailed the witness for five days for refusing to testify, and then, following a mistrial, threatened further sanctions when the witness again refused to testify at the second trial, but proceeded immediately to admit his prior testimony when he still refused. We held that this was not enough to make the witness unavailable. (*Sul, supra*, 122 Cal.App.3d at pp. 364-367.) In *Smith*, the witness properly was found unavailable only after she testified under oath that no sanctions would compel her to testify against her conscience. (*Smith, supra*, 30 Cal.4th at p. 621.)

Casey urges us to reject the case law extending the meaning of unavailability to situations in which a witness refuses to testify despite a court's reasonable efforts to compel testimony. The issue is settled in California, however, and we are neither

authorized nor inclined to reject the precedents on the subject. The only question is whether the court took adequate steps to induce Brandy to testify.

This case presents a special difficulty in answering that question. According to Code of Civil Procedure section 1219, subdivision (b), a court has no authority to incarcerate a victim of a domestic violence crime for refusing to testify about the crime.[2] The prosecutor and the trial court both knew this. What steps, then, could the court have taken to induce Brandy to testify that would have satisfied the requirements of *Smith* and *Sul*? In *Smith*, Code of Civil Procedure section 1219, subdivision (b), also barred the court from incarcerating the witness because she was a victim of a sexual assault which was the subject of the testimony sought from her. It was held to be sufficient that she testified under oath that she would not testify even if the court imposed other available sanctions, such as a fine. The court was not required to impose a fine. (*Smith*, *supra*, 30 Cal.4th at p. 624.) Here, the court not only did not impose a fine, but also did not ask Brandy to state under oath that she would not testify even if the court imposed available sanctions. It ordered her to participate in 72 hours of domestic violence counseling, but this did not appear to be designed to induce her to testify, since the court gave her over a month to comply, but admitted her preliminary hearing testimony immediately. Did the court do enough?

We need not solve this problem because the court's failure to take stronger steps to induce Brandy to testify or to establish that these steps would be fruitless was harmless. This case is unusual, for, although Brandy refused to testify, she blurted out for the jury the essence of what her testimony would have been: that she sustained her injuries through mutual combat with Casey. If the court had succeeded in inducing Brandy to

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[2]The parties appear to have missed this point. Casey implies, erroneously, that Code of Civil Procedure section 1219 bars incarceration only where the witness was a victim of a sexual assault, as opposed to a crime of domestic violence. The People do not challenge that view.

testify, therefore, we know what she would have said. The prosecution then would have been entitled to introduce her preliminary hearing testimony as a series of prior inconsistent statements under Evidence Code section 1235. Further, because the jury *did* hear Brandy say it was mutual combat and found Casey guilty anyway, we know which version the jury would have believed.

It is significant in this connection that Casey did not claim Brandy was injured in the course of fighting in which both were aggressors. He testified that he did not know how Brandy sustained her injuries. To reach a different verdict, the jury would have had to find either that Casey was lying even though he was innocent (i.e., it *was* mutual combat but he still pretended he did not know how she was injured), or that Brandy was lying *both* at the preliminary hearing *and* at trial (i.e., her injuries were not inflicted by Casey at all, either through an assault or mutual combat). Both inferences are improbable.

In sum, it is not reasonably probable that if the court had taken adequate steps under *Smith* and *Sul* to induce Brandy to testify, and she had testified, the results would have led the jury to a more favorable verdict. (*People v. Boyette* (2002) 29 Cal.4th 381, 428 [reasonable probability standard for harmless error review set forth in *People v. Watson* (1956) 46 Cal.2d 818, 835-836, applies to errors of state law].) If the court had taken adequate steps under *Smith* and *Sul* and Brandy still did not testify, the preliminary hearing testimony would have been admissible under Evidence Code section 1291, of course.

The result is the same when we consider the possibility of prejudice on count one, assault upon Michael Tilton with a deadly weapon. Brandy's preliminary hearing testimony was that Casey threw the rock at the car, not at the victim:

> "Q. Did you tell Investigator Estep on June 16th that Casey threw the rock at your windshield, but he was not attempting to hit you, Michael, or Matthew?
>
> "A. He wasn't, he was throwing it at my car."

As this contradicted the prosecution's account and was the essence of Casey's defense on count one, its admission at trial could not have been prejudicial to Casey.

Casey also argues that, at the preliminary hearing, he did not have an "opportunity to cross-examine the declarant with an interest and motive similar to" his interest and motive at trial, within the meaning of Evidence Code section 1291. Since protecting the right to cross-examine is the main purpose of the confrontation clauses in the state and federal Constitutions, the court's decision violated those clauses, as well as the Evidence Code, he contends.

Casey's claim on this point is based on the emergence of evidence after the preliminary hearing. At a trial confirmation hearing on August 28, 2008, about six weeks after the preliminary hearing, the prosecutor disclosed this evidence:

> "We received on August 26th medical records from [Ms.] McCready's visit to the Indian Health Clinic right after this incident. And there could conceivably be a mental disorder mentioned in here that they might argue is exculpatory. So I think it is discoverable."

The records were provided to defense counsel. Casey asserts that he was prejudiced because he was unable to cross-examine Brandy about this mental disorder at the preliminary hearing.

Casey's argument presupposes that a defendant's "interest and motive" in cross-examining a witness changes between the time of the preliminary hearing and the time of trial if a new basis for impeaching the witness emerges during that period. He has cited no case in which this was held to have happened, however, and we have found none. A situation in which new impeachment evidence would have that effect can perhaps be imagined, but this is not that situation. Defense counsel did cross-examine Brandy about a mental disorder at the preliminary hearing. Counsel asked whether Brandy had bipolar disorder and whether she was using medication for it on the day of the incident. Brandy replied that she did have the disorder and had taken medication for it that day. Counsel also asked how the condition was affecting Brandy that day: "Were you in the up or

down time?" Brandy answered, "On this medication, I'm pretty even keeled. I'm even." Casey argues that the mental disorder in the newly disclosed medical records could have been some other disorder from which Brandy suffered in addition to bipolar disorder. (The medical records are not included in the appellate record, so we do not know what disorder they mention.) Even if this guess is correct, we do not see how it could alter Casey's interest and motive in cross-examining Brandy. It would merely be an additional piece of impeachment evidence. Casey does not argue that the unknown mental disorder might have been relevant for any purpose other than impeachment. It would, further, be admissible to impeach the credibility of the nontestifying declarant (Evid. Code, § 1202), so there was nothing to prevent it from reaching the jury.

To summarize: We reject Casey's claim that the court prejudicially erred by taking insufficient steps to compel Brandy to testify; any inadequacy was harmless because a different result would not be reasonably probable if she had testified. We reject his claim that he was denied his right—statutory or constitutional—to cross-examine Brandy because he cross-examined her at the preliminary hearing and has not shown that the medical records disclosed at the trial confirmation hearing altered his interest and motive in cross-examining her by the time of trial.

III. Sufficient evidence of assault with a deadly weapon

Casey claims there was insufficient evidence to support the conviction on count (1), assault upon Michael Tilton with a deadly weapon. When the sufficiency of the evidence is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

To show that an object, such as a rock, that is not inherently deadly was used as a deadly or dangerous weapon, the prosecution must prove that the defendant intended to

use it in a manner that was capable of causing and likely to cause death or great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029; *People v. Reid* (1982) 133 Cal.App.3d 354, 365.) Casey acknowledges that a rock can be used as a deadly or dangerous weapon, but says "there was no evidence that [he] intended to use the rocks as deadly weapons," and "it was not shown that the rocks were likely to produce death or great bodily injury …."

Casey's contention that there was no evidence of his intent to use the rocks as deadly weapons is based on the assertion that "all parties involved stated that [Casey] was throwing rocks at the car." This assertion is misleading. Casey and Brandy both testified that Casey threw the rocks at the car or the headlights and not at the occupants, but that was not Michael's testimony. On direct examination by the prosecutor, Michael testified as follows:

> "Q. So the rocks were being thrown at you?
>
> "A. I would say so.
>
> "MR. GREEN: I'm going to object to the form of the question. It's leading.
>
> "THE COURT: Sustained.
>
> "BY MS. FLETCHER:
>
> "Q. Where were the rocks being—in whose direction were the rocks being thrown?
>
> "MR. GREEN: Same objection.
>
> "THE COURT: Overruled.
>
> "THE WITNESS: In my direction."

On cross-examination by defense counsel, Michael gave this testimony:

> "Q. That you told [Deputy Bobman] that Mr. McCready threw the rocks at the car; is that correct?
>
> "A. Yes, I did.

"Q. All right. And that's what he threw them at was the car.

"A. Well, I'm pretty sure he—me and my son was in the car.

"Q. Well, I know you were in the car. But that's what you told the deputy; is that right?

"A. Yeah, he—yes, he threw them at the car."

Like his trial counsel, Casey's appellate counsel implies that Michael's testimony means Casey only intended to damage the car, but it does not. Throwing "at the car" is logically compatible with trying to break the windshield and hit somebody inside. It is reasonably clear from Michael's testimony that he thought the rocks were aimed at him.

Other evidence indicated that Casey had a motive to hurt Michael. Brandy testified that when Casey picked up the rocks, he was yelling at her about having people in her car. Casey himself testified that, as he picked up the rocks, he asked Brandy why "those guys" were in her car. Brandy also testified that, while Casey was beating her, he asked if she was having sex with Michael and Matthew. Michael testified that, when they were at the sheriff's office, Casey demanded that Brandy get on the motorcycle with him or he would "mess with" Michael and Matthew; he also yelled at Michael to stay away from his wife.

It was also relevant, of course, that one of the rocks Casey threw hit the car's windshield near where Michael was sitting. The rock was four or five inches across and was heavy enough, and thrown with enough force, to break the windshield and scatter glass fragments on Michael. In light of all the evidence, the jury could reasonably infer that Casey was trying to hit Michael and hurt him.

We also disagree with Casey's claim that there was insufficient evidence that the rock was likely to cause great bodily injury or death under the circumstances. As we have just mentioned, the rock was four to five inches across, thrown with enough force to break the windshield, and struck a short distance from Michael. If the throw had been a bit harder, or the car a bit closer, the rock could well have penetrated the glass and struck

Michael. From these circumstances, the jury could reasonably infer that the rock was likely to cause great bodily injury or death.

Casey points out that Michael was not injured and that there was no evidence of the "shape or composition" of the rock. No injury is required to prove assault with a deadly weapon, however, and Casey has not explained how the shape and composition of the rock are relevant. In any event, we know the rock was heavy and hard enough to break a windshield, so its "composition" surely was sufficient to cause great bodily injury.

Casey also cites *People v. Beasley* (2003) 105 Cal.App.4th 1078, in which the Court of Appeal found insufficient evidence to support a conviction of assault with a deadly weapon where the defendant used a broomstick and left bruises on the victim's arms and shoulders. "Beasley did not strike her head or face with the stick, but instead used it only on her arms and shoulders. She did not describe the degree of force Beasley used in hitting her with the stick, and neither the stick itself nor photographs of it were introduced in evidence. The record does not indicate whether the broomstick was solid wood or a hollow tube made of metal, fiberglass, or plastic. Its composition, weight, and rigidity would necessarily affect the probability and likelihood that it could cause great bodily injury. The jury therefore had before it no facts from which it could assess the severity of the impact between the stick and [the victim's] body." (*Id.* at pp. 1087-1088.)

Beasley is distinguishable, even assuming it was correctly decided. Here the evidence was that the rock was four or five inches across and heavy enough to break a windshield. The jury had enough information about it to find that it was likely to cause great bodily injury.

IV. Instruction on simple assault

Casey asserts that the court should, on its own motion, have given the jury an instruction on simple assault as a lesser offense necessarily included in assault with a deadly weapon. We review de novo the court's instructions on lesser-included offenses.

(*People v. Cook* (2006) 39 Cal.4th 566, 596.) Casey's trial counsel told the trial court he did not want the jury to be instructed on any lesser-included offenses.

With or without a request, a trial court is required to give a jury instruction on a lesser offense necessarily included in a charged offense if evidence that would support a conviction of the lesser offense has been presented. If the evidence would support the charged offense but not the lesser offense, an instruction on the lesser offense need not be given. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; *People v. Prettyman* (1996) 14 Cal.4th 248, 274.)

In this case, the jury could not reasonably have found that Casey committed an assault but did not use a deadly weapon. If the jury believed Casey's testimony that he was aiming for the headlights, there would have been no assault at all. If it believed, instead, that he was throwing the rock at Michael, and throwing it hard enough to break the windshield, it could only conclude that the assault was with a deadly weapon. As the People say in their brief, "It is no wonder that [Casey's] trial counsel declined to make that argument to the jury, instead choosing to argue that [Casey] did not commit any kind of assault because he threw the rocks only at the headlights on Brandy's car, with no intent or purpose to hit or injure anyone in the car." Given the state of the evidence, the trial court was not obligated to give a lesser-included-offense instruction on its own motion.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Cornell, J.

_____
Hill, J.